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## FISCAL IMPACT REPORT

ORIGINAL DATE 1/30/07  
 SPONSOR HJC LAST UPDATED 3/2/07 HB 348/HJCS  
 SHORT TITLE Create Public Defender Commission SB \_\_\_\_\_  
 ANALYST Ortiz

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates SB226

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Public Defender Department (PDD)  
 Administrative Office of the Courts (AOC)  
 New Mexico Coalition for Justice  
 Administrative Office of the District Attorneys (AODA)

### SUMMARY

#### Synopsis of Bill

House Judiciary Committee substitute for House Bill 348 amends the Public Defender Act, Section 31-15-1 et. seq. NMSA 1978, to detach the Public Defender Department from the Corrections Department and make it an adjunct agency of the executive branch, and creates the Public Defender Commission to oversee the operation of the department.

#### **Department as Adjunct Agency**

HJC substitute for House Bill 348, while detaching the Public Defender Department from the Corrections Department and making it an adjunct agency of the executive branch, provides that the newly-created Public Defender Commission shall oversee the department and provide guidance to the Chief Public Defender (Chief). The bill provides that the Commission appoints the Chief Public Defender, and requires that the Chief's annual report with recommendations be

submitted to the Commission and, upon approval by the Commission, to the legislature and the governor.

- The commission shall not interfere with the discretion, judgment or advocacy of a public defender office, a public defender contractor or an assigned counsel in the representation of individual cases.
- The commission shall not interfere with the duties of the chief public defender, such as the administration of the department, the allocation and distribution of resources, management of personnel and contracts and other duties set forth in Section 31-15-7 NMSA 1978.

It adds that the chief public defender shall submit a budget to the commission, governor and legislature. States that the chief public defender shall continue serving until June 30, 2009 and continue to serve until a chief public defender is appointed by the public defender commission, but shall not serve after January 1, 2010.

### **Creation of Public Defender Commission**

HJC substitute House Bill 348 creates the Public Defender Commission and sets out qualifications for members as well as meeting requirements and organizational details. The difference in this substitute bill is that the New Mexico Hispanic bar association; the New Mexico Indian bar association; the New Mexico black lawyers association, and the New Mexico women's bar association will no longer be among those appointing members to the commission. Instead the governor and the chief justice of the supreme court will each appoint two members while the dean of the UNM law school, president of the state bar of New Mexico, the speaker of the house, president pro tempore of the senate, NM criminal defense lawyers association and the juvenile justice advisory committee will each appoint one member to the commission. The date of the appointments changes September from to August 1, 2007. The duration of terms for those appointed by dean of the UNM school of law, the New Mexico criminal defense lawyers association and the juvenile justice advisory committee shall be for four years; the duration of the term for commissioner appointed by the president of the state bar of New Mexico, the speaker of the house, president pro tempore of the senate shall be three years; and the governor and chief justice appointees shall serve for two years. The date of the commission's first meeting is changed from October to September 1, 2009.

The bill provides that the Commission “shall exercise independent oversight of the department and provide guidance to the Chief in the administration of the department and the representation of indigent persons pursuant to the Public Defender Act.” The Commission is also charged with developing standards for the operation of the department and the provision of services pursuant to the Public Defender Act.

### **FISCAL IMPLICATIONS**

The members of the commission are entitled to reimbursement pursuant to the Per Diem and Mileage Act, but otherwise receive no other compensation.

**SIGNIFICANT ISSUES**

The Public Defender Department states that this bill:

1. Would not accomplish its proponents’ goals of increased funding for the Department and is therefore unnecessary as an addition to the existing system;
2. Would make management of an already difficult-to-manage Department even more so;
3. Is vague and would create confusion between the Department and the commission and within the Department;
4. Gives the commission duties under Section 6 related to standards and operations that the Department already has in place and would therefore be redundant and superfluous;
5. Would create an unnecessary additional bureaucratic layer in a system already replete with procedural mandates; and
6. Would create attorney-client relationship ethical problems by its existence and operation.

Proponents of this bill state the following points:

1. The Governor, who ultimately sets law enforcement policy – administratively and through his legislative priorities – for the state should not also be in charge of an agency whose sole function is to protect the rights of those accused of a crime
2. The budget increases claimed by PDD are meaningless in a vacuum: when compared to the budgets and FTE levels of the District Attorneys, it is clear that PDD is still under-funded and under-resourced.

The following table shows the PDD budget as compared to the district attorneys’ budget.

Fiscal Year	Public Defender Department General Fund Appropriations (\$ in thousands)	Total DA Budget (including GF and auxiliary funding) (\$ in thousands)	Disparity (\$ in thousands)	PDD Budget as a Percentage of Total DA Budget
2003	\$29,091.9	\$43,029.7	\$13,937.8	67.6%
2004	\$29,560.0	\$50,332.0	\$20,772.0	58.73%
2005	\$30,638.5	\$50,445.3	\$19,806.8	60.74%
2006	\$34,475.5	\$53,146.6	\$18,671.1	64.87%
2007	\$36,789.8	\$55,473.1	\$18,683.3	66.32%
<b>Average Over 5 Years</b>	n/a	n/a	n/a	<b>63.65%</b>

The Public Defender Department adds that its recurring general fund growth from FY2003 to FY2007 increased 26.5%; contractual services growth FY2003 to FY2007 increased 14.5% and FTE growth for the same period increased by 15.3 percent. It also reports that it gave a 5% salary increases for attorneys, which was higher than the general state employee increase and gave salary differentials for attorneys in outlying department offices. Additionally, there were also increases made to contract attorney fees.

The PDD points the following non-recurring special appropriations during fiscal year 2003 to 2007

- \$964,600 for Santa Rosa Cases
- \$870,000 for Santa Rosa Cases
- \$300,000 for Santa Rosa Cases
- \$250,000 for Drug Cartel Cases

Proponents of the bill argue for increased funding and parity with the district attorney offices and note that although the PDD has seen a 26.5% growth in its General Fund appropriation between FY03 and FY07, during that same period, the DAs have seen a 30.8% increase, and the Courts have seen a 32.25% increase.

In regard to FTE count the PDD does have contract attorneys working for the agency, which the DA's do not but the DA's receive the support from the Administrative Office of the District Attorneys (AODA), the Attorney General's office, the state crime lab, and state and local police agencies. PDD is responsible for all costs related to its administration, investigators and experts.

### **ADMINISTRATIVE IMPLICATIONS**

The Public Defender Department argues that an independent commission, comprised of eleven members, would make administration of the department more difficult because many decisions must be made almost instantly by the Chief Public Defender and consultation with a commission would make this process almost impossible.

Proponents state that though this bill does create a new governmental entity, it is not a *cumbersome* new layer of bureaucracy. This commission would function much the same way a Board of Directors of a non-profit organization functions. It is necessary, in that there must be an oversight entity of any administrative agency, and in order to be politically independent, such a function may not be served by an individual or too small a group of individuals answerable to one or a very few appointing entities. A publicly elected oversight entity independent of the Executive is not an acceptable alternative, in that the purpose of independence, as identified by the American Bar Association, is to free the generally unpopular public defense function from **any** political influences.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Duplicates Senate Bill 226 with the exception of those noted above regarding commission appointees.

### **OTHER SUBSTANTIVE ISSUES**

The PDD suggests that the Chief Public Defender cannot be directed or "guided" or provided with "oversight," (provisions of the bill) by those who are not attorneys or attorneys not connected with the attorney-client relationship. A defendant's right to counsel, guaranteed by the Sixth Amendment to the United States Constitution and by Article II, Section 14 of the New Mexico Constitution, may be adversely impacted if the operations of the Public Defender Department are "overseen" by non-lawyers or lawyers who have no connection with the attorney-client relationship. Because of the vagueness of the terms "oversight" and "guidance" in the bill, there is a strong likelihood that the commission may intrude into areas in which its presence would be inappropriate.

An indigent criminal defendant is entitled to effective assistance of counsel, which must not be directed or influenced by those not licensed to practice law or those unconnected with the attorney-client relationship formed between Department lawyers and their clients. A defendant whose attorney must answer to others has had no real lawyer secured to him by the Sixth Amendment. Under the Rules of Professional Conduct, an attorney must maintain professional

independence and must not form partnerships with non-lawyers or lawyers unconnected with the attorney-client relationship when the business they are engaged in consists of the practice of law. The New Mexico Supreme Court Rules will not permit attorneys to work in an agency where a non-lawyer or lawyer unconnected with the attorney-client relationship has the right to direct or control his professional judgment.

Proponent point out that as currently constituted the PDD is under the oversight of the Governor, who also sets criminal justice policy for the state, and regularly introduces or signs into law legislation that creates new challenges for the defense of the criminally accused. Such activities render the Governor's oversight of the primary criminal defense law firm in the state a clear conflict of interest.

### **ALTERNATIVES**

Proponents agree that The PDD does point out a valid flaw in the bill, and recommend the following amendment:

“The Commission shall not interfere with the discretion, judgment or advocacy of a defender office, a contract defender office, or assigned counsel in the representation of individual cases.”

EO/mt:nt